BRIEF IN SUPPORT OF PETITION.

Opinions Below.

The District Court rendered no opinion in respect of Order No. 163; its opinion on Order No. 171 is unreported and appears at 219a. The opinion of the Circuit Court of Appeals is reported in 136 F. (2d) 633 and appears at 717.

Statement of the Case.

A summary statement of the facts is given in the petition, pages 4-10, above.

POINT I.

Apart from the validity of the orders entered, the Bankruptcy Court has jurisdiction to determine the taxes claimed by New Jersey against the Central Railroad in reorganization, and the Circuit Court erred in failing to protect the Trustees' right to be heard on the validity and amount of the original assessments.

There are only two forums where tax claims against a debtor railroad in reorganization may be heard, the State tribunals and the Bankruptcy Court itself. In *Arkansas Commission* v. *Thompson*, 313 U. S. 132, this Court indicated that such claims should be determined by the State agencies where a right of appeal to the State Courts exists, at the same time expressly leaving open the question of the jurisdiction of the Bankruptcy Court. More recently, the Circuit Court of Appeals for the Second Circuit has had before it the question of juris-

diction in the case of taxes claimed by a municipality, and has squarely upheld the jurisdiction of the Bankruptcy Court. *Lyford, Trustee* v. *City of New York*, 137 F. (2d) 782, decided Aug. 6, 1943. There the Circuit Court found that an unreasonable delay had occurred in the State proceedings, and directed the Bankruptcy Court to fix the liability.

The need for the exercise of jurisdiction is far more imperative here, for unless the Bankruptcy Court has power to act, the Trustees will be deprived of any right of review, no matter how illegal or erroneous the claims may be, since they have lost all right of contest before the state tribunals, in reliance upon a state statute which was expressly designed to end all contest.

The State of New Jersey can have no cause for complaint if the Bankruptcy Court determines the liability. The State duly filed its proofs of claim in the Bankruptcy Court. On the entry of Order No. 123 and before any challenge was made to the constitutionality of the original Settlement Act, the Trustees filed the necessary written undertaking, executed waivers and allowed the time to lapse for taking appeals, which cannot now be reinstated. Neither at that time nor at the hearing on Order No. 135 (confirming the steps taken in compliance with the original Settlement Act and directing the Trustees to pay the taxes for 1941 without protest or contest) nor at the hearing on Order No. 163 did the Attorney General or any one on behalf of the State indicate to the Bankruptcy Court any objection to the form or sufficiency of the documents filed under the original Settlement Act. The Trustees, in abandoning the pending appeals in the State tribunals in compliance with Order No. 123, acted in complete good faith. Further rights were lost because of Order No. 163, but at that point good faith and the time limit on the offer required

definitive action. The *status quo ante* cannot be restored, and unless the judgments of the Circuit Court are reversed or so modified as to direct the Bankruptcy Court to consider and determine the tax liability, the Trustees may have to pay the full amount of the original claims, however illegal and erroneous.

The Circuit Court misapplied the principles of *Railroad Commission* v. *Pullman*, 312 U. S. 496, and *Chicago* v. *Fieldcrest Dairies*, 316 U. S. 168, in stating that "it would • • • have been appropriate, in the exercise of a wise discretion, for the district court to have stayed its hand until the state court had determined whether the tax settlement acts were valid or a nullity". Under the circumstances here presented, it would have been fatal for the Bankruptcy Court to stay its hand. The amendatory offer demanded the surrender of all further right of contest and carried a 25-day time limit on acceptance. Had the Bankruptcy Court awaited without action the outcome of the State litigation, it might have preserved thereby the Trustees' right to continue their pending contest, but the Trustees necessarily would have lost the benefit of the State's offer, which everyone (save the Attorney General) deemed valid. As this Court said in the *Pullman* case, the rule is applicable only "in the absence of any showing that these obvious methods for securing a definitive ruling in the State courts cannot be pursued with full protection". See also *Meredith, et al.* v. *City of Winter Haven*, No. 42, October Term, 1943, decided by this Court on Nov. 8, 1943, 64 Sup. Ct. 7.

POINT II.

The Attorney General was without standing to appeal from the orders in the name of the State of New Jersey.

By his attitude and actions in this and the Chancery Court proceedings, the Attorney General has so far ignored and renounced his statutory duties as to forfeit his right to speak for the State in this case. Under the New Jersey statute, the Attorney General and his office are at the disposal of the legislative and executive arms of the State on all matters calling for legal advice. The statute provides (715) that "the attorney general shall, when not incompatible with his other public duties * * * b. Give to the members of the senate and assembly and to the executive * * * such legal information as they may from time to time request; * * * g. Attend generally to all matters in which the state is a party or in which its rights and interests are involved; and h. Act as advisor or counsel for all state boards, commissions or other state officials, and * * * be the sole legal advisor * * * thereof and represent them in all suits * * * that may be brought for or against them in any courts of this state". Obviously, by giving the Attorney General this authority, the legislature did not grant or intend to grant him the power to thwart its own policies as determined by its own legislation. Yet in both the Chancery proceeding and in the bankruptcy proceeding the Attorney General asserted a contempt for the Legislature and for the Governor, and arrogated to himself a superior wisdom on a vital matter of public policy. This he assumed to do in spite of the fact that the Comptroller, the chief fiscal officer of the State charged by statute with superintending the collection of the revenues and instituting and directing the

prosecution of suits for the recovery of monies due the State, consented to the orders.

By instituting the Chancery Court proceeding on behalf of the people, the Attorney General necessarily abdicated his duty and destroyed his right to act as the advisor and counsel for the State of New Jersey and its executive branch in this matter. By this course of conduct he forced the legislature to employ other and independent counsel in order to defend one of its own laws. Having disqualified himself to act in support of the executive branch, the Attorney General disqualified himself to act for the State in taking an appeal in the name of the State for the purpose of attacking its own legislation. See *Parker* v. *State*, 133 Ind. 178 (1893), 33 N. E. 119.

Moreover, the Attorney General did not purport to appear generally as the Attorney General for the State. He entered a special appearance only, and in it he explicitly stated that he did not submit to any exercise of jurisdiction by the Bankruptcy Court over the constitutionality of the Acts (54a), and at the hearing he moved orally to dismiss so much of the rule to show cause as sought an adjudication of the constitutionality of the second Settlement Act, or, in the alternative, to withhold any action until the State Courts had passed upon the question (63a). In effect the Attorney General said: "I, as Attorney General, am here for one purpose and one purpose only, namely, to insist that the Bankruptcy Court shall not determine the constitutionality of the Acts". This is the equivalent of saying: "I, as Attorney General, do not appear at all except for the purpose of challenging the Court's jurisdiction to determine the constitutional point since the Chancery Court alone has such jurisdiction". In reality he was endeavoring to protect his Chancery Court proceeding, nothing more. Under these circumstances, the

Attorney General must be taken as acting for the people and not as counsel for the State. Had he been acting for the State, there would have been no purpose served in carefully limiting his appearance as he did, since the State already was a party. The Bankruptcy Court scrupulously recognized the character of the appearance, and did precisely what the Attorney General asked it to do, for it entered the orders on a principle of local law not requiring a determination of constitutionality. The Attorney General, having appeared only in his capacity as attorney for the people, had no standing to take an appeal in the name of the State as a claimant creditor.

The Circuit Court said that the Attorney General had "not only urged the impropriety of the Court's exercising its jurisdiction but in the alternative put the constitutionality of the settlement acts at issue". The record does not support the latter part of this statement. On the contrary, the Attorney General insisted that the Bankruptcy Court could not consider the constitutional issue under any circumstances because the question already was before the Chancery Court (157a). Beyond this he did not go.

Because a state tax, not a city tax, is involved (*State Board of Assessors* v. *C. R. R. Co. of N. J.*, 48 N. J. L. 146; see also 293a) and because the City of Jersey City is not a party to the bankruptcy proceeding, the City clearly had no standing to take an appeal from Order No. 171; it did not attempt to appeal from Order No. 163.

POINT III.

The Circuit Court passed upon a question of local law in a way conflicting with the New Jersey decisions.

Under the decisions of the New Jersey Court of Errors and Appeals, a duly enacted statute is not null and void, even though later declared unconstitutional, and actions taken in good faith under the statute are effective, certainly when taken prior to any challenge. *Allison* v. *Corker*, 67 N. J. L. 596; *Lang* v. *Bayonne*, 74 N. J. L. 455; *Attorney General* v. *McGuinness*, 78 N. J. L. 346; *Eastwood* v. *Russell*, 81 N. J. L. 672; *In re Public Utility Board*, 83 N. J. L. 303.

In the *Allison* case, a statute, later declared unconstitutional, was accepted and acted upon. Subsequently it was amended and supplemented by an admittedly valid Act which corrected the original defect. The question was whether the supplemental Act cured the vice in the original Act and thus supported the acts already taken in reliance thereon. The Court of Errors and Appeals held the statute valid and effective. In so holding, the Court said (pp. 600-601):

> "But I am prepared to go further and hold that an unconstitutional statute is nevertheless a statute—that is, a legislative act * * *. The function of the judicial department, with respect to legislation deemed unconstitutional, is not exercised *in rem*, but always *in personam*. The Supreme Court cannot set aside a statute as it can a municipal ordinance. It simply ignores statutes deemed unconstitutional. For many purposes an unconstitutional statute may influence judicial judgment, where, for example, under

> color of it, private or public action has been taken. An unconstitutional statute is not merely blank paper. The solemn act of the legislature is a fact to be reckoned with. Nowhere has power been vested to expunge it or remove it from its proper place among statutes."

In the *Lang* case, the plaintiff, who had been discharged as a member of the police force of the City of Bayonne, sought to obtain a peremptory mandamus compelling his restoration, on the ground that the statute under which the police board had acted in causing his discharge was unconstitutional. The Court of Errors and Appeals held that while the act creating the police board was unconstitutional, nevertheless the acts done by the Board antecedent to a judicial declaration of unconstitutionality were valid and enforcible. The case is significant since it in effect reverses an earlier case in New Jersey, *Floucher* v. *Camden,* 27 Vroom 244, and expressly refuses to follow *Norton* v. *Shelby County,* 118 U. S. 425. The Court of Appeals in the *Floucher* case and this Court in the *Shelby County* case had said that no rights can be acquired under a statute later declared invalid, since the statute is void *ab initio.* In the course of its opinion in the *Lang* case the Court said (p. 459):

> "* * * I am unable to accept as sound the doctrine upon which it [the *Shelby County* case] is rested, namely, that an unconstitutional law is void *ab initio* and affords no protection for acts done under its sanction."

And again (p. 459):

> "* * * it [the *Shelby County* case] fails to recognize the right of the citizen, which is to accept the law as it is written, and not to be required to determine its validity. The latter is no more the function of the citizen than is the making of the law."

In *In re Public Utility Board* (1912), 83 N. J. L. 303, 306, the Court said:

> "An act of the legislature, duly passed by both houses and approved by the governor, is presumably a valid statute; and even though violative of some constitutional provision, it is not therefore null and void *ab initio*. As was said by Chief Justice Butler in *State* v. *Carroll*, 38 Conn. 449: 'Every law of the legislature, however repugnant to the constitution, has not only the appearance and semblance of authority but the force of law. It cannot be questioned at the bar of private judgment, and, if thought unconstitutional, resisted, but must be received and obeyed as, to all intents and purposes, law, until questioned and set aside by the courts. This principle is essential to the very existence of order in society.' The soundness of this doctrine is not in doubt in this state."

In *Chicot County Drainage District* v. *Baxter State Bank*, 308 U. S. 371, this Court indicated approval of the doctrine of *Lang* v. *Bayonne*, although it runs counter to its own earlier decision in the *Shelby County* case.

In these cases the action taken was before any challenge had been made. In *Attorney General* v. *McGuinness*, 78 N. J. L. 346, 371, the Court of Errors and Appeals indicated that the existence of a bare challenge does not vary the local New Jersey rule. In that case it said:

> "For such mistaken conception leads to the radical error that, if duly challenged, a legislative act will be sustained only when it is demonstrably constitutional. Such a notion in effect supplements the constitution by requiring the affirmative concurrence of all three departments of the government where that instrument of the organic law requires but two, viz., the legislative and the executive * * *."

The debtor's relinquishment of all further rights to contest in the State tribunals, whether by express waiver or by allowing time to lapse, was first made under authority of Order No. 123 responsive to the 1941 Settlement Act, at a time when no challenge and no notice of any contemplated challenge had occurred. The 1942 Act was amendatory of and supplemental to the 1941 Act, and Order No. 163, responsive to the 1942 Act, was necessary to preserve a change in status already made in reliance upon the earlier Act. Such a state of affairs justified, if, indeed, it did not require, the Bankruptcy Court to order compliance upon the principle that the legislative offer was the law of the state until declared unconstitutional.

Moreover, this Court has now held that a District Court, having the necessary jurisdiction over the parties and acting in the exercise of its equity powers, may determine the local law where, due to the situation existing, it is appropriate for it to do so. *Meredith et al.* v. *City of Winter Haven*, No. 42, October Term 1943, decided by this Court on Nov. 8, 1943, 64 Sup. Ct. 7. In the *Winter Haven* case, jurisdiction rested upon diversity of citizenship, while here it rests on Section 77 of the Bankruptcy Act. There the circumstance which made a determination essential was the confusion existing in the decisions of the State Courts. Here the situation made a determination even more imperative, for the State decisions on the effectiveness of a statute even though later declared unconstitutional were clear, immediate action was necessary, and there was no dispute as to the meaning of the statute.

The concluding paragraph of the opinion of this Court in the *Winter Haven* case is apposite here:

> "Even though our decisions could not finally settle the questions of state law involved, they did adjudi-

cate the rights of the parties with the aid of such light as was afforded by the materials for decision at hand, and in accordance with the applicable principles for determining state law. In this case, as in those, it being within the jurisdiction conferred on the federal courts by Congress, we think the plaintiffs, petitioners here, were entitled to have such an adjudication."

Conclusion.

This case involves matters of novel impression and first importance which should be reviewed by this Court, and writs of certiorari should issue for that purpose as prayed for in the foregoing petition.

Respectfully submitted,

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